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17 UNITED STATES DISTRICT COURT
18 FOR THE NORTHERN DISTRICT OF CALIFORNIA
19 SAN FRANCISCO DIVISION

20 UNITED STATES OF AMERICA,

21 3:16-cr-00440-WHA-1

22 Plaintiff,

23 vs.

24 **DEFENDANT'S MOTION FOR LEAVE
25 TO FILE MOTION FOR
RECONSIDERATION**

26 YEVGENIY NIKULIN,

27 a/k/a "Chinabig01"

28 a/k/a "dex.007"

a/k/a "valeriy.krutov3"

a/k/a "itBlackHat",

29 Defendant.

30 **NOTICE OF MOTION**

31 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

32 **PLEASE TAKE NOTICE THAT** Defendant will move for leave to
33 file a motion for reconsideration of this Court's September 5,

1 2018 Order, ("Order") Dkt. 61, which denied Defendant's
2 Administrative Motion to file Defendant's response to the Court's
3 August 24 Order under seal.

4 This motion will be based on this Notice of Motion and
5 Motion for Leave to File a Motion for Reconsideration of Order
6 denying Defendant's Administrative Motion to file Defendant's
7 response to the Court's August 24 Order under seal, the Memorandum
8 of Points and Authorities, the Proposed Order, and the files and
9 records in this matter and any oral argument that the Court may
10 hear.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 Pursuant to Civil Local Rule 7-9, Defendant YEVGENIY
14 NIKULIN respectfully requests this Court grant him leave to file a
15 motion for reconsideration of the September 5, 2018 Order, Dkt. 61
16 to the extent it denied Defendant's Administrative Motion to file
17 Defendant's response to the Court's August 24 Order under seal.

19 Pursuant to Civil Local Rule 7-9(a), "Before the entry
20 of a judgment adjudicating all of the claims and the rights and
21 liabilities of all the parties in a case, any party may make a
22 motion before a Judge requesting that the Judge grant the party
23 leave to file a motion for reconsideration of any interlocutory
24 order on any ground set forth in Civil L.R. 7-9 (b). No party may
25 notice a motion for reconsideration without first obtaining leave
26 of Court to file the motion." Under Civil Local Rule 7-9(b),

28 the moving party must specifically show

1 reasonable diligence in bringing the motion,
2 and one of the following:

3 (1) That at the time of the motion for leave,
4 a material difference in fact or law exists
5 from that which was presented to the Court
6 before entry of the interlocutory order for
7 which reconsideration is sought. The party
8 also must show that in the exercise of
9 reasonable diligence the party applying for
10 reconsideration did not know such fact or law
11 at the time of the interlocutory order; or

12 (2) The emergence of new material facts or a
13 change of law occurring after the time of such
14 order; or

15 (3) A manifest failure by the Court to
16 consider material facts or dispositive legal
17 arguments which were presented to the Court
18 before such interlocutory order.

19 Generally, under Local Rule 79-5(b), "[a] sealing order
20 may issue only upon a request that establishes that the document,
21 or portions thereof, are privileged, protectable as a trade secret
22 or otherwise entitled to protection under the law."

23 In our case, Exhibit 1, which accompanied Defendant's
24 Administrative Motion to file Defendant's response to the Court's
25 August 24 Order under seal should be sealed for several reasons.
26 First, said Exhibit contains highly confidential and privileged
27 Stipulated Settlement between the Executive Director of the
28 Medical Board of California and Alexander Grinberg, M.D., the
psychiatrist approved by this Court to conduct mental examination
of Mr. Nikulin. It is well-settled that there is a public policy
of promoting settlement disputes outside the judicial process, and

1 disclosure of this settlement would result in an decreased
2 likelihood of future settlements should this Court discloses it.

3 Further, Federal Rule of Evidence 408 specifically
4 prohibits admissibility of settlement negotiations, including
5 settlements involving a third party. See, e.g., Cook v. Yellow
6 Frgrt. Sys., 132 F.R.D. 548, 554 (E.D. Cal. 1990) ("while it is true
7 that Rule 408 is addressed to the inadmissibility of evidence at
8 trial and generally pertinent to the inadmissibility of compromise
9 material to prove damages or liability in the claim of origin,
10 "the same consideration of policy which actuates the courts to
11 exclude an offer of compromise made by [the defendant to the
12 plaintiff], also apply to settlement [negotiations between the
13 defendant and a third party"); Goodyear Tire & Rubber Co. v.
14 Chiles Power Supply, Inc., 332 F.3d 976, 981 [6th Cir 2003] ("The
15 public policy favoring secret negotiations, combined with the
16 inherent questionability of the truthfulness of any statements
17 made therein, leads us to conclude that a settlement privilege
18 should exist, and that the district court did not abuse its
19 discretion in refusing to allow discovery.")

20 Indeed, Rule 408 "evidences a strong public policy
21 favoring the confidentiality of attempts to voluntarily resolve
22 disputes." Cook, 132 F.R.D. at 554 citing McCormick on Evidence,
23 at 811 (3rd. ed. 1984). The Ninth Circuit has stated that one of
24 the principles underlying Rule 408 is the "promotion of public
25 policy favoring the compromise and settlement of disputes." United
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1 States v. Contra Costa County Water Dist., 678 F.2d 90, 92 (9th
2 Cir. 1982). Therefore, this Court's failure to allow Defendant to
3 file said Exhibit under seal would have a chilling effect on
4 future similar settlements involving medical professionals.

5 Third, "all lawful privacy intrusions must be narrowly
6 drawn and reasonably related in scope to the justification for
7 their initiation." Cook, 132 F.R.D. at 552 (citation omitted). In
8 this case, Defendant proposes to seal only Exhibit 1 and agrees to
9 file his response to the Court's August 24 order on the public
10 docket. Thus, this would comply with the public policy that "all
11 lawful privacy intrusions must be narrowly drawn and reasonably
12 related in scope to the justification for their initiation." In
13 addition, said Exhibit's marginal relevance to this case is
14 outweighed by the privileged nature of settlement discussions
15 involving totally unrelated third party.

16 Finally, the sealing of Exhibit 1 is proper since it
17 contains Dr. Grinberg patents' personally identifiable
18 information, which disclosure is prohibited by the Health
19 Insurance Portability and Accountability Act ("HIPAA") and
20 California's Confidentiality of Medical Information Act ("CMIA").
21 The purpose of HIPAA is to protect individually identifiable
22 health information. Cranford v. Taylor, No. 1:07-cv-1136-BLW-LMB],
23 2009 U.S. Dist. LEXIS 41562, at *3 (E.D. Cal May 7, 2009) (citing
24 45 C.F.R. § 164.508(a)(1)). HIPAA prohibits the wrongful
25 disclosure of individually identifiable health information,
26
27

1 defined as information that relates to the physical or mental
2 health or condition of an individual, or the provision of health
3 care to an individual, that identifies the individual. Turner v.
4 Salinas, No. 2:10-cv-1848 MCE KJN P, 2012 U.S. Dist. LEXIS 172748,
5 at *1-2 (E.D. Cal Dec. 3, 2012) (citing 42 U.S.C. § 1320d-6; 45
6 C.F.R. § 160.103).

7 Here, even though the patients' names are redacted in
8 said Exhibit, their identity can be revealed if combined with
9 other publicly available information. See Cal. Civ. Code §
10 56.05(j) (Information is also individually identifiable if it can
11 be combined with other publicly available information to reveal a
12 person's identity.) Said Exhibit is filled with descriptions of
13 patients' age, gender, medical conditions, diagnoses, dates of
14 treatment, prescribed medications and other medical information,
15 which if combined with other publicly available information, such
16 as the name of their doctor would reveal their protected
17 personally identifiable information. Therefore, the Court should
18 reconsider its decision and allow Defendant to file its Exhibit 1
19 under seal.

20 CONCLUSION

21 For the foregoing reasons, Defendant respectfully
22 requests that this Court grant him leave to file a motion to
23 reconsider its Order denying Defendant's Administrative Motion to
24 file Defendant's response to the Court's August 24 Order under
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27
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1 seal. Specifically, Defendant respectfully requests to modify
2 said Order permitting Defendant to file only Exhibit 1 under seal.
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4 Dated: Brooklyn, New York
5 September 10, 2018

6 Respectfully submitted,

7 / s/ Arkady Bukh

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